present time. I have the honor, first, to call upon Dr. Theodore S. Woolsey, formerly Professor of International Law in Yale University. Mr. Woolsey bears a name distinguished on both sides of the ocean in international law, and he has continued that distinction with undiminished lustre. I have great pleasure in presenting him.

RETALIATION AND PUNISHMENT

ADDRESS OF THEODORE S. WOOLSEY,
Formerly Professor of International Law in Yale University

Two years ago I could have said in this place without fear of contradiction that since the Napoleonic era, international law has mightily advanced in at least two particulars, the humanization of war and the rights of neutrals. Can one honestly say this today? We students of that law, watching with absorbed interest the events of the past seventeen months, are substantially agreed, I think, that the two great protagonists of land warfare and of naval war, Germany and Britain, under the plea of military necessity have violated practically every law which stood in their way. Neutral rights are no longer regarded. Undefended towns are bombarded from the air and from the sea. Destruction of private property as a war measure has been carried to an unexampled length. The non-combatant has been cruelly abused. Murder by submarine has become a commonplace. War has been carried into neutral territory. The world is full of plotting and espionage, of explosion and arson, of duplicity and treachery, of suffering and death. And civilization, which means the reign of law, sinks below this bloody horizon. Is it strange that we should be told that international law exists no longer?

A law unenforced does not survive. A criminal statute whose violation is never punished, is worse than none. But when penalty follows violation, that law, no matter how often broken, is triumphant. So is it with the law of nations. If those who have broken its rules are not called to account; if the government which offends can not be held responsible, then truly our law has broken down. If on the contrary, somehow sooner or later, breaches of the law shall be punished and governments can be made responsible for wrong-doing, then the law is vindicated.

A brief study, therefore, of the punishment of those offenses against the rules of war, which are commonly called war crimes, means more

than the natural wish that illegalities or barbarities should be punished and thus checked. It involves the more fundamental belief that if, in spite of grave difficulties, trial and punishment can be judicially applied to such infractions of the laws of war, international law will be justified and civilization preserved.

At the outset I ask two concessions. First, that without argument, I may disregard the German theory that *Krieg's raison geht vor Krieg's recht, i. e.,* that military necessity, which is really military convenience, is paramount to law. It is to be remarked, in this connection, that if a stipulation agreed to and ratified by a state is held binding by that state only so long as seems convenient, then future stipulations by that state will not be credited without a guaranty. And second, I reject the theory, too often advanced today, that neutral rights can be lawfully qualified by the need of reprisals or of self-defense as between belligerents. Law is law and meant to be obeyed.

If disobeyed, how can it be enforced? There are two ways. If your enemy does certain things to you, you may do the same to him to prevent a repetition; or if he does certain wrongful acts, you may punish the wrong-doer. The two ways, then, are retaliation and punishment.

The rules authorizing retaliation for violation of the laws of war are vague and ill-defined, nevertheless operative. Lieber, in his codification of the law governing land warfare, issued to the Northern Army in 1863, states the principle thus:

> §27. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch, yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.
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> §28. Retaliation will therefore never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.
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> Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

What did Lieber mean by "protective retribution"? Perhaps his §62 will help to make this clear.

> All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

Yet at the capture of Fort Pillow in 1864, although according to Rhodes some of the black troops were refused quarter and shot after surrender, there was no retaliation. Lincoln, however, threatened retaliation upon Confederate prisoners if the South put a law into effect refusing quarter to negro troops and their white officers. Although the original wrongdoer is the one to whom retaliation will naturally be applied, it need not be limited to him. Lieber §59:

> A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities. All prisoners of war are liable to the infliction of retaliatory measures.

These rules, drawn up by the distinguished German–American publicist, are thus fully given, because upon his code subsequent codes were based, but, alas, neither the Brussels nor Hague rules for land warfare treat of retaliation at all. The Russian draft, in 1874, had proposed, as quoted by Oppenheim: (1) that reprisals should be admitted only in extreme cases of absolutely certain violations of the rules of legitimate warfare; (2) that the acts performed by way of reprisals must not be excessive but in proportion to the respective violations; (3) that reprisals should be ordered by commanders-in-chief only; but the subject was dropped. Presumably it was too difficult, too delicate a matter to be discussed with any hope of agreement.

The Oxford Code, adopted by the Institute of International Law in 1880, embodies these rules, adding that reprisals are prohibited if reparation is made, and that they must respect the laws of humanity and morality. This code, as you know, is an academic performance only, and its treatment of retaliation is vague. Nor have the text writers, as individuals, been much more explicit. Some follow Lieber textually, others add each some significant thought, others still are silent, which leads Oppenheim in 1906 to say: "Writers on the law of nations have hitherto not systematically treated of the question of

war crimes and their punishment." I quote a few sentences from publicists of repute.

Holland in his War Code (p. 46), writes: "Reprisals need not resemble in character the offense complained of. They may be exercised against persons or property. Punishment of the real offender must be unattainable." And as examples of extreme reprisals he cites the execution of prisoners and the destruction of villages on account of offenses committed in them.

Lüder says: "If the violations of the laws of war by the enemy were passed without retaliation, a belligerent would be at a disadvantage and worse off than his enemy who was guilty of the violation," which is hardly a lofty sentiment. And elsewhere Professor Lüder, quoted by Westlake, writes: "According to known maxims, non-fulfilment by one party deprives that party of the right to claim fulfilment by the other."

Westlake himself treats of retorsion temperately and sanely: "Retorsion in war is the action of a belligerent against whom a law has been broken, and who retorts by breaking the same or some other law in order to compensate himself for the damage which he has suffered and to deter his enemy from continuing or repeating the offense. Where the same law is broken, the proper term is retaliation, but there is no difference of principle between the cases, and the term retorsion covers both." And again, "but the immediate sufferers from retorsion are hardly ever the persons who were guilty of the offense which called for it."

Now add American opinion to German and British. Snow, in his excellent Manual for our Navy (p. 93), declares that "where the offending person or persons can not be reached, and if the enemy refuses or neglects to bring him to trial or punishment, the belligerent has the right of retaliation. It should not be resorted to until an opportunity is afforded the enemy for explanation or redress. If possible the retaliation should be in kind, unless the action of the enemy is in gross violation of the dictates of humanity and of civilized warfare."

If we attempt to deduce from opinions like these the rules which should govern this form of reprisals, they would be something like the following: you may penalize one illegality by committing another; you should try to retaliate upon the persons guilty of the infraction; failing this, and if the other belligerent will not punish his own, you may do to any of your enemies what they have done to you. This includes prisoners.

Two illustrations of the working of these rules in the present war are reported; namely, the harsher treatment of French prisoners in German hands to penalize the alleged unhealthful employment of German captives in North Africa; and the use of asphyxiating gas in retaliation for its use by Germany.

Plainly these rules are open to criticism. For one thing, they may be one sided because the physical power to carry them out may be wanting. If Germany uses asphyxiating gases in war with Serbia, how can Serbia retaliate! How could the Boers reply to British devastation by wasting England.

Again, being founded upon a reciprocal illegality, they disturb the mind, though this may be balanced in some cases by their furnishing a speedy spectacular and workable remedy for a wrong. They are confessedly very limited in application. If state A permits or orders its soldiers to terrorize a population by violence to women, by killing non-combatants or shielding a body of men behind them, by waste and destruction of property, retaliation by B is neither logical nor civilized. If A bombards Rheims cathedral, shall B knock down the cathedral of Cologne?

In this lack of authoritative rules, let us try to apply right reason with future legislation in view. May we not say, for instance, that retaliation should only apply to the person; only to combatants; only to serious offences; only after careful investigation; and only when those committing or ordering the offence are out of reach. Even so, we shall be in danger of drifting into Lieber's "internecine war of savages."

Take a hypothetical case. Submarine attack upon a merchant ship without warning and care for its occupants, in the opinion of most of our body, is murder. Who is guilty? The man higher up, who devised and ordered it? He is out of reach. Therefore a prisoner shall pay the penalty in his place. What prisoner is so suitable as the guilty man's son, and so Von Tirpitz the son is hanged for his father's crime. All this is in accord with the rules. But one may be very sure that several English prisoners would be made to atone for Von Tirpitz' death, and so on in deadly reciprocity. When the first submarine captives were set apart in England as if for special treatment, a similar number of English prisoners in Germany was segregated, awaiting details. It was inevitable.

And, therefore, I would add to the rules governing retaliation the

suggestion that evidence of the offense complained of be laid before some neutral body whose verdict alone should authorize the injured belligerent to undertake the retaliating act. Subject to this condition, retaliation to punish certain offences and prevent their repetition is a just, prompt and effective weapon.

In most cases, however, crime should be punished, not by another crime, but by ferreting out, trying and punishing the criminal, which brings me to the second head, the punishment of war crimes.

Simple crimes of pillage, of lust, of arson and of violence, committed by soldiers, with no military object, should be tried and punished by their own authorities, and this is usually the case, if for no other reason, because without such discipline a force soon loses value. If unpunished, the perpetrators if known and captured may be punished by an enemy. A certain quantity of such crime seems inseparable from war. These, however, are but a small fraction of the violations of the rules of civilized war, of which the victims have a right to complain.

There may be destruction of property out of all proportion to the alleged act which it is intended to penalize.

There may be slaughter of wounded or refusal of quarter in accordance with orders.

There may be new and illegal methods of destruction, or the deliberate breach of old rules.

There may be calculated terrorism.

In such cases it is the principal rather than the agent, or along with the agent, who most deserves punishment. Unfortunately it will not always happen that the fortune of war makes the punishment of such principal a practicable thing. Are we to be content with the punishment of vanquished delinquents only? That would be one-sided justice.

Moreover, the definition of war crimes; the penalty due for property damage as well as for damage to the person; the ascertainment of fact when atrocities are charged; the treatment of prisoners; the intent and justification when religious, educational or charitable institutions are bombarded: these and other questions are too delicate, too intense for *ex parte* determination. They require the judicial attitude as well as the judicial mind.

And so the conclusion is reasonable that the whole matter of trying and punishing war crimes should, if possible, be placed in neutral

hands. That is, that an international court, perhaps through its own referees and assessors, in accordance with a system previously agreed to in treaty form, should on complaint, investigate, judge and affix the penalty to crimes, the said penalty to be executed by that belligerent which happened to have the body of the delinquent in its power.

Two basic theories of punishment are suggested as reasonable. (1) Crimes against the person shall meet with personal penalties—imprisonment or death; while crimes involving property shall be punished by fine, individual or national. (2) The scale of penalty shall be that fixed by the penal law of the country of the accused. The distinction between crimes against the person and crimes involving property damage seems to me fundamental. To kill one's own soldiers for looting may be essential to military discipline and therefore necessary. But the object which we are contemplating is not military efficiency. It is the protection of the non-combatant from abuse and of the person of the combatant from illegal methods of war. The problem therefore approximates a civil rather than a military character. To reckon illegal property damage in terms of imprisonment or death, and conversely to punish personal damage, (sniping or railway wreck, for instance) in terms of property destruction, seems to me both illogical and unjust. The ideal is to punish violators of the laws of war and so prevent a repetition of the offence. If you punish murder by death, devastation by national indemnity, and minor property damage by personal fine, assessing such penalties as the civil and criminal laws of the accused require, are you not most likely to attain this ideal? And, if practicable, crimes should be tried by this international court in the midst of arms, without waiting for the return of peace. Something like this was the suggestion of the Carnegie Commission to inquire into the atrocities of the Balkan Wars, a committee of inquiry to accompany belligerent forces, the details of the scheme not being worked out.

Whether such an international court in the heat of conflict or even after a war could be made workable, could really gather evidence, could have its jurisdiction respected, its penalties enforced, is of course uncertain. Even if agreed to in time of peace, what assurance could we have that in the passion of war it would be respected? Would public opinion be a strong enough backing? Should pledges of property be given in anticipation? Where should the power and duty of executing the law reside? Such questions are easy to ask, but hard to

solve. I am only outlining an ideal. Nevertheless, unless something like this ideal is realized, we may well despair of the future of international law as relating to war. Punishment must follow crime with sufficient certainty to impress the criminally inclined. Punishment of the vanquished only, though better than nothing, fails of this certainty. It will be interpreted as revenge. Punishment of law breakers amongst the victors, as human nature goes, is unlikely except through neutral agencies.

The CHAIRMAN. We will continue the discussion of the topic before us, and I have pleasure in calling upon Mr. Edward A. Harriman, of the Bar of New Haven, Conn., formerly of the law faculty of Northwestern University, and of the faculty of Yale University, and one who has been conspicuously identified with the international law societies of both this country and Europe.

WHAT MEANS SHOULD BE PROVIDED AND PROCEDURE ADOPTED FOR AUTHORITATIVELY DETERMINING WHETHER THE HAGUE CONVENTIONS OR OTHER GENERAL INTERNATIONAL AGREEMENTS, OR THE RULES OF INTERNATIONAL LAW, HAVE BEEN VIOLATED?

ADDRESS OF EDWARD A. HARRIMAN,
Of the Bar of New Haven, Conn.

The simplest way to answer this question is to ask another: What means exist and what procedure has been adopted for authoritatively determining whether any agreement, or any rule of law, has been violated? The means ordinarily provided is a judicial tribunal, and the procedure adopted is a judicial procedure. The means, therefore, for determining whether an international agreement or a rule of international law has been violated should be a court, and the procedure before that court should be judicial procedure. It must be noted that so far as persons within the jurisdiction of the United States are concerned, the courts and the procedure already exist for the determination of questions of international law. To quote from one of our most distinguished American jurists, Simeon E. Baldwin,[1]

[1]American Bar Assn. Journal, I, 521.